Supreme Court, U.S.
FILED

No. 09-_____

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In The Supreme Court of the United States

LELAND GRASKE,

Conditional Cross-Petitioner,

v.

ANNE DOYLE,

Conditional Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an award for a wholly derivative claim, such as loss of consortium, must be reduced in proportion to the negligence of the injured party from whom the claim derives.

PARTIES TO THE PROCEEDINGS

Conditional Cross-Petitioner:

Leland Graske

Conditional Cross-Respondent:

Anne Doyle

Dismissed Parties – Third-Party Defendants:

Jason R. Haynes – voluntarily dismissed without prejudice October 5, 2007.

Caribe Inflatables USA, Inc. – dismissed with prejudice for lack of personal jurisdiction September 27, 2006.

Kirk Marine – dismissed with prejudice for lack of personal jurisdiction September 27, 2006.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE CONDITIONAL CROSS-PETITION	3
I. Anne Doyle's Petition Seeks To Create A New Remedy That Ignores The Derivative Nature Of Her Claim And Is, Therefore, In Conflict With Circuit Court Decisions Which Reduce A Derivative Claim In Proportion To The Injured Spouse's Negligence	3
A. Loss Of Consortium Is A Derivative Claim	4
B. As A Derivative Claim, Anne Doyle's Award, If Any, Must Be Reduced In Proportion To Daniel Doyle's Negligence	5
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) 4

Burke v. Quick Lift, Inc., 2009 WL 3491219 (E.D.N.Y. 2009) 4

Christofferson v. Halliburton Co., 534 F.2d 1147 (5th Cir. 1976) 4

Duffy v. United States, 49 F.Supp.2d 658 (S.D.N.Y. 1999) 6

Hales v. Firestone Tire and Rubber Co., 636 F.2d 585 (W.D. Mo. 1986), *affirmed in part and reversed in part on other grounds*, 820 F.2d 928 (8th Cir. 1987) 7

Mayo v. Tri-Bell Indus., Inc., 787 F.2d 1007 (5th Cir. 1986) 6

McDonough v. Celebrity Cruises, Inc., 64 F.Supp.2d 259 (S.D.N.Y. 1999) 4

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 6

Runcorn v. Shearer Lumber Products, Inc., 690 P.2d 324 (Idaho 1984) 7

Simeon v. T. Smith & Son, Inc., 852 F.2d 1421 (5th Cir. 1988) 6, 7

Tuggle v. Allright Parking Sys., Inc., 922 S.W.2d 105 (Tenn. 1996) 4, 6

Wartman v. Commodore Cruise Lines, Ltd., 100 F.3d 943, 1996 WL 47964 (2nd Cir. 1996) 6

Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978) 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

Supreme Court Rule 12(5) 1

OTHER AUTHORITIES

1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-4 (4th ed. 2004) 5

F. Harper, F. James, O. Gray, 3 *The Law of Torts* § 8.99 7

W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 125 (W. Page Keeton ed. 1984) 4, 5, 7

Restatement (Second) of Torts § 494 (1965) 5

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12(5), Leland Graske respectfully submits this Conditional Cross-Petition for Writ of Certiorari. This Conditional Cross-Petition is contingent upon the Court granting a writ of certiorari on the issue of the availability of loss of consortium damages to Anne Doyle, which is presented in a Petition for Writ of Certiorari filed in Case No. 09-857.

OPINIONS BELOW

The decision of the Court of Appeals for the Eighth Circuit is reported at 579 F.3d 898 (8th Cir. 2009). It is reproduced in the Appendix to the Petition for Writ of Certiorari in *Anne Doyle v. Leland Graske*, No. 09-857, at App. 1-19. The opinion of the United States District Court for the District of Nebraska is reported at 565 F.Supp.2d 1069 (D.Neb. 2008). It is reproduced in the Appendix to the Petition for Writ of Certiorari in *Anne Doyle v. Leland Graske*, No. 09-857, at App. 20-58.

JURISDICTION

The Eighth Circuit rendered its opinion on September 2, 2009 (Petitioner's App. 1). The parties' cross-motions for en banc hearings were denied on October 22, 2009 (*Id.* App. 68). Petitioner's Petition

for Writ of Certiorari was filed on January 18, 2010 and docketed on January 20, 2010. Cross-Petitioner questions subject matter jurisdiction and the ability of the United States federal courts to exercise admiralty jurisdiction over a tort that occurs within the inland waters of a foreign nation. The issue of subject matter jurisdiction is the basis of a Petition for Writ of Certiorari in *Leland Graske v. Daniel Doyle and Anne Doyle,* No. 09-888. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Daniel Doyle ("Doyle") suffered physical injury when he fell out of a boat being operated by the Cross-Petitioner approximately 300 yards from the shore of the Grand Cayman Island.

The district court found that Doyle violated a passenger's duty to use reasonable care for his own safety and apportioned ten percent of the total liability to Doyle (Petitioner's App. 54). The district court awarded $750,000.00 in loss of consortium damages to his wife, Anne Doyle, but did not proportionately reduce her award to reflect Doyle's negligence (*Id.* App. 58).

The Eighth Circuit Court of Appeals found that loss of consortium damages were unavailable under general maritime law for injuries occurring beyond United States territorial waters and reversed the loss of consortium award. Anne Doyle has filed a Petition

for Writ of Certiorari seeking reinstatement of the award. Respondent opposes Anne Doyle's Petition, but, in the event it is granted, petitions this Court to consider whether a derivative award for loss of consortium should be reduced in proportion to the injured spouse's negligence.

REASON FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. Anne Doyle's Petition Seeks To Create A New Remedy That Ignores The Derivative Nature Of Her Claim And Is, Therefore, In Conflict With Circuit Court Decisions Which Reduce A Derivative Claim In Proportion To The Injured Spouse's Negligence

The district court's opinion, which Anne Doyle seeks to reinstate, is in conflict with circuit court decisions awarding consortium damages in other, limited, maritime situations that have recognized the derivative nature of a consortium claim and have reduced the claim accordingly. If this Court chooses to create a new remedy allowing loss of consortium damages to the spouse of a nonseafarer injured beyond the territorial waters of the United States, it must address the effect that it will have on claims wholly derivative of this new remedy. The Court has not previously recognized a remedy for a spouse such as Anne Doyle, and has not, therefore, addressed the derivative nature of her claim.

A. Loss Of Consortium Is A Derivative Claim

Loss of consortium is a derivative claim. *See American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 287 n.1 (1980) (recognizing wife's award for loss of consortium is "wholly derivative" of her husband's award). The Fifth Circuit recognized the fact that under maritime law consortium claims are derivative. *See Christofferson v. Halliburton Co.*, 534 F.2d 1147, 1148-49 (5th Cir. 1976). *See also Burke v. Quick Lift, Inc.*, 2009 WL 3491219 (E.D.N.Y. 2009) and *McDonough v. Celebrity Cruises, Inc.*, 64 F.Supp.2d 259 (S.D.N.Y. 1999).

Courts and commentators have explained that the "right of the spouse or parent to recover will of course depend upon the existence of tortious conduct on the part of the defendant." W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 125 (W. Page Keeton ed. 1984). Thus, a legally cognizable consortium claim generally requires "that there must be a tort for which an action might be maintained by the injured spouse or child." *Id.* As a consequence, courts have often referred to a spouse's loss of consortium claim as "derivative" of the injured spouse's claim. *See, e.g., Tuggle v. Allright Parking Sys., Inc.*, 922 S.W.2d 105 (Tenn. 1996) ("Courts following the majority rule regard a claim for loss of consortium as derivative for purposes of comparative fault.").

B. As A Derivative Claim, Anne Doyle's Award, If Any, Must Be Reduced In Proportion To Daniel Doyle's Negligence

The derivative nature of a consortium claim logically affords the defendant in a consortium action the defenses that he would have had against the injured spouse. As Professors Keeton and Prosser have noted, "courts generally have concluded that the recovery of the spouse . . . will be defeated or diminished by defenses which would bar or diminish that of the injured spouse." Keeton et al., *supra*. Consequently, the "***contributory negligence . . . on the part of the injured person has been held to defeat recovery, or, in comparative negligence states, to reduce it.***" *Id.*; *cf.* Restatement (Second) of Torts § 494 (1965) ("The plaintiff is barred from recovery for an invasion of his legally protected interest in the health or life of a third person which results from the harm or death of such third person, if the negligence of such third person would have barred his own recovery.") To do otherwise would produce the incongruous result that a non-injured spouse could recover proportionally more than the injured spouse, whose society the former claims to have lost.

General maritime law employs a "'pure' comparative fault system" in maritime tort cases. 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-4 (4th ed. 2004). The predominating rule in comparative-fault jurisdictions in the United States is that a court must reduce a consortium award in proportion to the

injured spouse's fault. *See, e.g., Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1011-12 (5th Cir. 1986) (The "majority of comparative negligence jurisdictions that have considered the issue in the context of loss of consortium" have reduced the plaintiff's award by the amount of fault attributed to the negligent spouse.); *Duffy v. United States*, 49 F.Supp.2d 658, 664 n.3 (S.D.N.Y. 1999) ("That [the plaintiff] is properly chargeable with his wife's negligence is not questioned by him and is in accord with the weight of authority."); *Tuggle*, 922 S.W.2d at 108-09 ("The clear majority of jurisdictions . . . hold that a loss of consortium award must be reduced, and may be barred, by the comparative fault of the physically injured spouse."). In keeping with the majority rule, if Anne Doyle is entitled to consortium damages, they must be reduced by the amount of Doyle's negligence.

In admiralty situations involving injury to seamen in territorial waters where loss of consortium damages are allowed, the courts have reduced the consortium award by the percentage of the injured person's negligence. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 22 (1990) (reciting that "[a]fter discounting for [decedent's] contributory negligence, the jury awarded [plaintiff] $7,254 for the loss of support and services of her son."); *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421 (5th Cir. 1988); and *Wartman v. Commodore Cruise Lines, Ltd.*, 100 F.3d 943, 1996 WL 47964 (2nd Cir. 1996) (in which wife's award for consortium was reduced by the percentage of fault attributed to her husband).

In reducing the wife's loss of consortium claim, the *Simeon* Court stated:

> That Mrs. Simeon is properly chargeable with her husband's negligence is not questioned by her and is in accord with the weight of authority. *See, e.g.* W. Prosser & P. Keeton, *Prosser & Keeton on the Law of Torts* § 125 at 937 (1984) ("[T]he courts generally have considered that the recovery of the spouse . . . will be defeated or diminished by defenses which would bar or diminish that of the injured spouse. . . . Thus contributory negligence . . . on the part of the injured person has been held to defeat recovery, or, in comparative negligence states, to reduce it." [Footnotes omitted]); F. Harper, F. James, O. Gray, 3 *The Law of Torts* § 8.99 at 555 n. 17 (2d ed. 1986) ("[W]here the doctrine of comparative negligence obtains, most courts have similarly reduced the award for loss of consortium by the percentage of negligence attributed to the physically injured spouse."); [Citation omitted]. To say that the loss of consortium action by the spouse not physically injured is independent is not the same as saying that it is not derivative of the injured spouse's right of action. *See Whittlesey v. Miller,* 572 S.W.2d 665, 667 (Tex. 1978).

Simeon, 852 F.2d at 1434 n.14.

Common sense dictates that if a tortfeasor is liable for 90% of the direct injury he causes, he should not be held liable for more than 90% of any indirect injury caused. *See Runcorn v. Shearer Lumber*

Products, Inc., 690 P.2d 324 (Idaho 1984). The proportional-liability rule does not dictate a contrary result. *See, e.g., Hales v. Firestone Tire and Rubber Co.*, 636 F.2d 585 (W.D. Mo. 1986), *affirmed in part and reversed in part on other grounds*, 820 F.2d 928 (8th Cir. 1987).

CONCLUSION

If this Court grants Anne Doyle's Petition for Writ of Certiorari, the limitation of recovery on derivative claims needs to be addressed because the district court's opinion is in conflict with the circuit courts that have reduced consortium awards in admiralty under different factual situations.

Respectfully submitted,

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